Supreme Court
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No. 92-1114

In The

Supreme Court of the United States

October Term, 1992

NANCY JOHNSON, on behalf of herself and all others similarly situated,

Petitioner,

v.

UNITED STATES RAILROAD RETIREMENT BOARD,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The District Of Columbia Circuit

REPLY BRIEF FOR THE PETITIONER

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The respondent Railroad Retirement Board opposes the request for review solely on the alleged ground that its action subsequent to the decision below has rendered the matter without controversy. If the Court does not accept that view of events, however, the Board agrees with petitioner's alternative suggestion that, at a minimum, the Court should hold the petition pending resolution of *Reno v. Catholic Social Services,* No. 91-1826.

The Board's view of justiciability is in error, as its post-decisional Order did not correct the flawed statutory interpretation at issue. Consequently, the Board has not mooted out the controversy, and the petition remains

appropriate for consideration. Moreover, there are significant reasons specific to the jurisdiction of the district courts over the Board, and independent of the disposition in *Catholic Social Services*, for the Court to grant the petition. While holding it until that disposition is an option, the split in the circuits regarding district court jurisdiction over the Board strongly counsels in favor of plenary review and resolution of that issue at this time in order to dispel the confusion amongst the lower courts.

1. The Board argues that its Order No. 92-263 of August 14, 1992 (Resp. App. 1a-2a) has ended the substantive dispute. Specifically, it contends that petitioner's "complaint no longer presents a justiciable controversy." Resp. Br. at 6. The complaint, which was dismissed by the district court (the action which resulted in affirmance by the court of appeals in its No. 90-5380 and which is now before this Court on this petition), was filed on September 21, 1989. Petitioner sought to represent a nationwide class of all those affected by the Board's 1981 decision to deny Tier I benefits to railroaders' spouses and widows with children who reached the age of 16. Among other things, the complaint sought declaratory and injunctive relief for all class members, with the intended result that they would receive all the Railroad Retirement annuities which the Board's challenged policy had denied them.[1]

The Board's Order, however, only provides a small portion of the relief which was requested for the class or which could be reasonably expected if the district court is

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[1] See Complaint, Prayer for Relief, ¶¶ 3-4, 6, in Appendix to court of appeals Nos. 90-1243, -5380, at 15-17 (lodged with the Clerk by the Board).

allowed to exercise jurisdiction.[2] First, the Board's Order is effective only to prevent Tier I terminations that would have otherwise taken place on or after August 1, 1992. Resp. App. 2a, ¶ 1. For the caretaker spouses of children who turned age 16 before that date, however, the terminations remain in effect. Of course, this result affects the great majority of the class members, as the policy has been in effect since 1981.

Secondly, even for those previously affected caretakers who formally questioned the prior terminations, the Board's Order restores their benefits only effective from August 1, 1992. Resp. App. 2a, ¶ 2. That is, even those class members who *challenged* the Board's policy will receive as relief something less than the two years of benefits of which the Board's now-discredited policy has deprived them. Even the Social Security Administration, when it has corrected its illegal policies, has recognized that claimants who pursued their administrative remedies are entitled to full repayment of the benefits which they have been denied.

Finally, the Board's Order does not end its policy of recovering "overpayments" from caretaker spouses whose Tier I benefits were mistakenly not terminated

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[2] It is not entirely clear, but petitioner does not understand the Board to question her right to proceed as a class representative. Because she filed the complaint as a class action and sought class certification before dismissal, the fact that she has since received her requested benefits does not diminish her right to pursue the class action aspect of the complaint. *United States Parole Commission v. Geraghty*, 445 U.S. 388, 402-404 (1980).

under the prior policy. Recovery of these alleged overpayments – which, of course, were not in fact overpayments under the decisions of three appellate courts[3] and now under the Board's August 14 Order – will continue. The Board will waive recovery for those for whom recovery had not begun as of that date, Resp. App. 2a, ¶ 3, but, for the great majority, the recovery was either ongoing, or had been completed, on July 31, 1992. These claimants will continue to have their annuities reduced to recover "overpayments", and will therefore receive no relief from the Board's Order.

If this Court or the court of appeals ultimately determines that the district court has jurisdiction over the complaint, the matter would be remanded to consider petitioner's motion for class certification, which was pending at the time that the complaint was dismissed. It is almost certain that the district court would certify some class; the only conceivable issue is whether it would be chronologically limited to those affected by the challenged policy at and after the time of the filing of the complaint (Sept. 1989) or whether the class would extend back to the implementation of the invalid policy, as the courts have often held. See, *e.g.*, *Bowen v. City of New York*, 476 U.S. 467 (1986). Whatever the opening date for class membership, however, the class would include thousands

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[3] *Costello v. United States R.R. Retirement Board*, 780 F.2d 1352 (8th Cir. 1985); *Johnson v. United States R.R. Retirement Board*, 925 F.2d 1374 (11th Cir. 1991); *Johnson v. United States R.R. Retirement Board*, 969 F.2d 1089 (D.C.Cir. 1992).

of claimants who will receive no relief at all from the Board's Order.[4]

The Board's Order effects only partial relief. It does not offer relief at all for the great majority of those harmed. Even for the few who pressed their administrative claims, the Order provides only some relief. The challenged policy is still very much in operation, and the matter presents a justiciable controversy. The Board's Order does not remotely moot this matter, and provides no basis to deny the petition for a writ of certiorari.[5]

2. The Board recognizes that one "not . . . inappropriate" action for the Court would be to hold the petition pending resolution of *Catholic Social Services*. Resp. Br. at 8. In petitioner's view, however, this matter deserves plenary review regardless of the outcome in that case, and, therefore, the Court should grant the petition at this time without waiting for that resolution. As petitioner has detailed (Pet. Br. at 20-22), the courts are split on the issue of district court jurisdiction over the Board. Two

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[4] As petitioner has previously noted, Pet. Br. at 9 n.1, the Board estimates that, between the beginning of this policy in 1981 and the implementation of the Board Order in August 1992, from 5400 to 8700 wives and widows have lost their Tier I benefits. Only 660 will receive relief under the Board's Order.

[5] Even one of the three Members of the Board finds the Board's Order unacceptable and demanding of correction. He has recently termed the limited nature of that Order "a formula for a policy of rank discrimination, desperate treatment, and gross unfairness which is embarrassing to the agency, indefensible, and immoral," and has urged the Board "to restore payments to all families affected by the board's previous policy since 1981." Memorandum of Member Speakman to Members Bower and Kever (Feb. 25, 1993).

appellate courts have expressly recognized that jurisdiction, and several, including this Court, have implicitly accepted the district courts' jurisdiction, see Pet. Br. at 21 n.7; by contrast, two (including the court below) have explicitly found district court jurisdiction to be lacking.

The confusion generated by these different approaches should be resolved once and for all. Railroad Retirement claimants should have the opportunity, like other beneficiaries of federal retirement and disability programs, to seek relief on a class-wide basis from the Board's improper policies and statutory constructions. This Court should therefore grant the petition in order to terminate the dispute about district court jurisdiction over the Board.[6]

For the foregoing reasons, and those stated in the petition, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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APRIL 1993

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[6] Petitioner does not understand the distinction which the Board attempts to draw between this case and *Catholic Social Services* on the one hand, and *Thunder Basin Coal Company v. Reich*, No. 92-896 (cert. granted March 8, 1993) on the other. See Resp. Br. at 8 n.4. The Court's decision to grant the petition in the latter supports petitioner's position that this petition should be granted without waiting for the resolution in *Catholic Social Services*.